IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

SALLIE BOX AND TOM BOX,	)	
	)	
CLAIMANTS,	)	
	)	
VS.	)	CLAIM NO. T20051266
	)	
STATE OF TENNESSEE,	)	
	)	
DEFENDANT.	)	

JUDGMENT

This matter was heard by the Claims Commission on February 24, 2009. The claimants, Sallie and Tom Box, seek damages from the State arising from injuries that Mrs. Box sustained when she fell as she was leaving the Murphy Center on the campus of Middle Tennessee State University ("MTSU"). The claimants were represented by Phillip Kendrick, Esq. The State was represented by Assistant Attorney General Dawn Jordan.

Pursuant to Tenn. Code Ann. § 9-8-403(i), the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Accident.

The Murphy Center

On May 19, 2005, Sallie and Tom Box attended their foster grandchild's graduation from LaVergne High School, which was held at the Murphy Center at MTSU in Murfreesboro, Tennessee. They arrived at the Murphy Center in late afternoon, when it was still light. The weather was clear. Because Mr. Box is disabled and was using a cane, the Boxes parked in the handicapped parking lot adjacent to the center. Mrs. Box, however, had no disability at the time of her accident.

Pictures of the Murphy Center show what appears to be a low square shaped building, which is elevated from the surrounding campus and bounded by a sloping lawn. A long set of stairs leading up to the facility is accessible from the corner of the building nearest the parking lot. A sign is posted at the base of the steps, which shows a wheelchair and an arrow indicating a handicapped ramp to the right of the sign.

After the Boxes left their car, they walked until they saw a man wearing a vest at the corner of the facility, who appeared to be directing

people inside. The proof did not establish that the man was an employee of the University. The testimony reflected that when the facility is used for events like the high school graduation in question, those schools are responsible for getting participants in and out of the facility and often bring in their own people to work the event to save expenses.

Loading dock entrance

The Boxes asked the man for directions to the handicapped entrance to the building and were instructed to go down the left sidewalk to the flat area. The entrance to which the Boxes were directed was actually a loading dock and not the designated "ADA" accessible entrance. MTSU employees were instructed to direct persons needing an ADA accessible entrance to an entrance on one of the other sides of the building. That entrance was farther away from the handicapped lot than the loading dock entrance. MTSU officials were aware that people sometimes used this entrance and did not prohibit them from doing so.

The sidewalk in front of the loading dock ramp is twenty feet wide and contains yellow crosshatching. The loading dock ramp itself is two sided. The left side, which is a fire lane, is fairly level from the sidewalk to

the entrance of the building, a distance of approximately 133 feet. There are yellow caution lines on the sides of this half of the ramp marking it as a fire lane and prohibiting parking. The right side of the ramp slopes downward from the sidewalk to the building, creating a drop-off between the two uneven surfaces. The sloped side of the ramp is used by trucks offloading deliveries. In addition, there were trash dumpsters located on that side of the ramp.

There is a large yellow traffic bollard, which witnesses referred to as a "pole," at the end of the ramp near the sidewalk between the two sides of the loading dock ramp. Ron Malone, MTSU Assistant Vice President for Events and Transportation, testified that it marked the corner for trucks that were backing up. Although its exact height was not disclosed, pictures of Mr. Box standing next to the bollard show that it came to slightly above his shoulder.

A chain link fence separated the two sides of the ramp and prevented access to the drop-off from the left side of the dock to the sloped right side. The fence, however, did not extend all the way to the end of the ramp and there was a 56 inch open space from the point at which the fence

stopped to the bollard through which either side of the ramp could be accessed.

As a result of the slope, there was a drop-off from the left side to the right side ranging from eight inches nearest the end of the fence to two inches near the bollard. The testimony showed that the unfenced area had existed for more than twenty years, apparently without incident. The gap was convenient for loading and unloading trash cans and provided truck drivers with a place to open their doors without hitting the fence.

On the way into the graduation ceremony, the Boxes walked past the sloped ramp and the yellow bollard and turned right onto the level half of the loading dock ramp to enter the building. Mrs. Box testified that on the way into the building she did not walk between the bollard and the fence because it was light and she could see that they should stay on the sidewalk and go around the yellow bollard and the end of the fence. There were other people also walking in that direction. Pictures of the area from the vantage that Mrs. Box would have had as she walked down the sidewalk to enter the building clearly show that the two sides of the ramp

are uneven and that the fence does not cover the complete length of the ramp.

Mrs. Box's Fall

The Boxes walked out of the building together the same way that they had entered sometime between 8:30 p.m. and 8:45 p.m. There was a "wall pack" on the overhang over the ramp, which shone onto the loading dock as they exited. According to Mrs. Box, there were between 40 and 80 other people on the ramp as they left. Mrs. Box testified that it became darker as they went up the ramp because so many people were coming out and their shadows made it darker.

In addition to the light on the overhang, Mrs. Box testified that there was another light further away, which was in front of them as they exited, although "it was not making a lot of light." In her deposition, Mrs. Box agreed that "there were lights all around the area." She also conceded that after she fell, she could see the decline of the ramp.

Mr. Box was walking to Mrs. Box's right and holding onto her right arm. Mrs. Box was holding onto the fence with her left hand, using it as a handrail as she went up the loading dock. She did not see anyone else

cross in front of the yellow post between it and the fence. Mr. Box did not cross between the end of the fence and the post. When she reached the end of the fence, Mrs. Box testified that she could not see the ground, the bollard or her feet. Believing she was on the sidewalk, Mrs. Box turned left, and fell off of the upper ramp, ending up on her back.

Claimants' Expert Proof

Tim McLaughlin, a licensed professional engineer, testified for the claimants. Mr. McLaughlin has a master's degree from the University of Kentucky in civil engineering. He is currently Supervisor for Plant Operations and Maintenance for the Metropolitan Davidson County Public Schools. Mr. McLaughlin was offered as an expert in the area of construction and safety related to school facilities, specifically entrances, exits and exterior lighting.

According to McLaughlin, there are codes and regulations establishing written safety standards adopted by the State. In addition, there are also "general safety standards" for industry that are not contained in the codes. McLaughlin testified that there is an accepted industry standard for lighting in public facilities, although there are no

written codes governing this subject. He testified that he did not know of any lighting standard that required a certain candle power; however, light should be sufficient for people to be able to see their feet. Mr. McLaughlin testified that there are also industry standards relative to uneven sidewalks and lighting in parking lots.

McLaughlin visited the scene of Mrs. Box's fall three times: on May 23, 2006, when a video was made of the location; on January 10, 2007, when he took light readings; and again on a subsequent occasion that he did not record. According to Mr. McLaughlin, the area between the fence and the yellow bollard did not comply with the industry standard of care because a person stepping off the left hand side of the ramp onto the lower sloped side would not encounter a flat surface. There were no markings to delineate the edge of the upper ramp from the lower ramp. Furthermore, he testified, areas where there is a step-off require a handrail. McLaughlin opined that some form of barrier should have been in place between the fence and the yellow bollard.

According to McLaughlin, there were recessed lights underneath the overhang for the first 75 feet after one exited the building through the

double doors. There was a 400 watt wall pack on the front of the overhang on the left side of the ramp. The purpose of the wall pack was to illuminate the walkway.

There were also three wall packs on a utility pole approximately 220 feet from the yellow bollard near the parking lot near the handicapped parking lot. One light pointed toward the stairwell at the corner of the building, one pointed toward the sidewalk in front of the loading dock, and the third pointed down the sidewalk toward the ADA entrance. When Mr. McLaughlin viewed the area, there were three trees between the loading dock and the utility pole. According to McLaughlin, when he visited on May 23, 2006, the illumination "didn't get hardly past the trees."

When Mr. McLaughlin visited the location on January 19, 2007, he took light readings of the area. He got a reading of five foot candles directly beneath the wall pack. At ten feet from the building the reading was thirteen foot candles, at twenty feet the reading was just less that six foot candles, and at thirty feet the reading was two foot candles. At forty feet the light reading dropped to .97. Fifty-eight feet from the wall pack the reading was .35. At 60 feet the reading dropped to .25 foot candles.

Mr. McLaughlin testified that he was unable to obtain a reading after 60 feet. The yellow bollard was 73 feet from the overhang.

Mr. McLaughlin testified that when he viewed the area it was dark where Mrs. Box fell. He could see the surface of the walkway, but he could not tell that there was a drop off from the left side of the ramp. He could, however, see the yellow bollard. Mr. McLaughlin recalled that the weather was clear when he viewed the scene; however, he did not recall whether the moon was out. Records from the U. S. Naval Observatory relative to the night of the accident describe the phase of the Moon as "waxing gibbous with 81% of the Moon's visible disk illuminated." Sunset in Murfreesboro on May 19, 2005, had been at 7:47 p.m.

Mr. Malone testified that at the time of the accident, the trees located between the utility pole and the ramp were shorter and did not obscure the light from the utility pole that shone down on the ramp. Mr. Malone also testified that when the accident occurred there was a light at the weight room directly across from the loading dock that shone down on the ramp. The light, which was on an old wooden pole, was removed as a

part of the renovations done when the University hosted the Sunbelt Conference Basketball Tournament in March of 2006.

Claimants' Injuries.

Injury to Ankles and Foot

Following the accident, Mrs. Box was transported to the Vanderbilt Medical Center Emergency Room, where she complained of severe right ankle pain as well as pain in the left foot and ankle. Mrs. Box was diagnosed as having sustained a fracture dislocation of her right ankle, which occurs when the ankle joint pops out of socket. X-rays showed a trimalleolar ankle fracture, which is characterized by a fracture in three areas of the ankle. Mrs. Box also sustained a fifth metatarsal fracture on her left foot and a sprained left ankle.

Mrs. Box underwent surgery to repair the fracture to her right ankle the following day on May 20, 2005, performed by Franklin Shuler, M.D. Dr. Shuler performed an open reduction and internal fixation (ORIF) of the fracture, which involved the insertion of a metal plate and screws to align and stabilize the bones. The left foot break was treated conservatively without surgery.

Mrs. Box tolerated the ankle surgery well and there were no complications. Her records reflect that she was transferred to the regular orthopedics floor and the rest of her stay was relatively unremarkable. Following the surgery, Mrs. Box remained in Vanderbilt until May 24, 2005, when she was discharged to the Stallworth Rehabilitation Center for further therapy and rehabilitation.

Mrs. Box returned to Dr. Shuler on June 7, 2005, for follow up. Dr. Shuler noted mild tenderness in the left foot. Her right foot had well-healed surgical incisions and Dr. Shuler removed her stitches. X-rays showed alignment of her fracture and Mrs. Box was released to "toe-touch weight bearing" on the right lower extremity" and to "weight bearing as tolerated" on the left.

Mrs. Box was discharged from the Stallworth Rehabilitation Center on June 15, 2005. She returned to Dr. Shuler on June 29, 2005, and reported that she had been hopping on the left foot in physical therapy which caused pain and swelling on the lateral border of her foot. Dr. Shuler's examination showed "really mild to no tenderness to palpation over the base of the fifth metatarsal" of the left foot. Her range of motion was non-

painful. He noted "some only slight swelling and no ecchymosis." Dr. Shuler's records make no mention of having spoken with Mrs. Box concerning a hernia.

Dr. Shuler testified that Mrs. Box's last x-ray showed minimal post-traumatic changes in her right ankle when he last saw her on April 18, 2006. He recommended anti-inflammatory medications for that. Mrs. Box was released at that time to return on an as needed basis. She has not returned.

Recurrent Hernia

On June 30, 2005, Mrs. Box saw Addison May, M.D., for evaluation of a recurrent hernia at Dr. Shuler's request. Dr. May's clinic note, which appears not to have been dictated until July 13, 2005, indicates:

> This is a 61-year old female who was involved in a motor vehicle collision and treated here at Vanderbilt. She was subsequently released and has been undergoing rehabilitation for that. Of significance, she had previously undergone surgery for a ventral umbilical hernia. After the accident she has become increasingly symptoms (sic) with a hernia with abdominal pain and protruding mass. She was subsequently referred by Dr. Shuler.

Dr. May noted that Mrs. Box had intermittent abdominal pain. He was able to palpate the hernia, which he found protruded significantly in two

separate directions. Dr. May believed that she might have two distinct hernias with separate hernia sacs and that she was a high risk for incarceration of the bowel. Dr. May concluded "from the progression of this disease," that Mrs. Box should have surgery as soon as possible.

Mrs. Box returned for a preoperative history and physical on July 7, 2005. The physician recording the history wrote that Ms. Box was "requesting repair of two hernias." One, which she noted in 2004, was in the right lower quadrant. According to the history, she noted a new larger hernia in the left lower quadrant at the time of her fall.

Reference to a preexisting hernia is also contained in a report by George Avant, M.D. relative to a colon examination that he performed on Mrs. Box on October 7, 2004. At that time Dr. Avant noted that Mrs. Box "has an umbilical hernia, which she believes requires repair."

Dr. May scheduled Mrs. Box for hernia surgery on July 11, 2005. An operative report was dictated on July 11, 2005, sometime after the surgery. The report lists the preoperative diagnosis as "recurrent umbilical hernia." The postoperative diagnosis was "recurrent complex umbilical hernia with incarceration of the bowel and omentum."

Dr. May noted that Mrs. Box had " a previous history of ventral hernia repair in the past and after suffering a motor vehicle collision has had increasing symptomatic hernia."

The following day on July 13, 2005, Dr. May wrote Dr. Shuler the following:

> Thank you for referring Mrs. Box back to see me regarding her recurrent hernia. I saw this patient on June 30, 2005, and agree that her hernia was quite symptomatic, enlarging, and at high risk for incarceration and strangulation.
>
> She underwent operative repair of this yesterday and she had a large hernia sac with incarcerated colon in the hernia defect. Her repair was uneventful and I hope she has a fully uneventful recovery.

Mrs. Box was discharged on July 18, 2005. Her discharge summary reflects that Dr. May performed a "reduction of [Mrs. Box's] incarcerated hernia, excision of hernia sac, repair of ventral hernia with Alloderm and primary repair." The summary also reflects that post-operatively, Mrs. Box had shortness of breath and tachycardia, which was determined to have been caused by a pulmonary embolus. May testified that the pulmonary emboli were probably the result of the initial trauma, the fall, and then the two surgical traumas that followed."

Dr. May testified by deposition that Mrs. Box's previous hernia surgery had taken place in 1994, when a ventral umbilical hernia was repaired. This surgery had been a simple hernia repair in which the two edges of the abdominal wall were sewn back together. According to Dr. May, these types of hernias tend to recur over time and that "almost certainly" Mrs. Box's hernia had recurred in addition to other defects in her abdominal wall. As to the cause, May opined that "[a]pparently, at the time of her fall, intra-abdominal tissue got pushed out into her abdominal wall and was stuck there."

Mrs. Box's emergency room records after her fall, however, reflect that she denied any "head trauma, neck chest, abdominal, or proximal lower extremity trauma or pain." With the exception of her orthopedic injuries, her physical examination was normal. Notation was made that Mrs. Box's abdomen was "soft, nontender, and nondistended." Mrs. Box testified that she did not notice the hernia until sometime after she returned home on June 15, 2005, and before she returned to see Dr. Shuler for a clinic appointment on June 29, 2005. She apparently did not seek

medical treatment for the hernia until her clinic appointment with Dr. Shuler, when he referred her to Dr. May.

According to Dr. May, all of Mrs. Box's hernias were through her mid-line fascia:

> The muscles in the belly wall are covered by a thick layer of connected tissue called fascia, and the fascia from each side unites and forms just a strip of fascia in the mid line so that there is actually no muscle.
>
> As we get older and during other times like pregnancy, the muscles actually can separate so that there is nothing but fascia in the middle.
>
> So, for example, with her age group, it's not – it's fairly common to have a fairly wide strip of no muscle, just fascia there. And then, so you don't have to have a hole through the muscle. You just have to have a hole through that fascia. And that's where all of her holes were.

Questioned about the cause of hernias, Dr. May testified that they are related to multiple etiologies, including "laxity of the abdominal wall or lack of closure of a defect that allows over time a defect to enlarge." Other contributing factors include weight, amount of exertion [or] activity, and smoking. Any repetitive stress on the abdominal wall will increase the risk of reoccurrence or primary hernia.

According to May, hernias can also be caused by trauma, such as motor vehicle collisions in which a piece of the belly wall tears away from its insertion into the pelvis. When Dr. May operated on Mrs. Box, he noticed none of the tearing of the abdominal wall that he sometimes sees after a trauma like a motor vehicle accident.

In Mrs. Box's case, Dr. May testified that:

> She clearly had a pre-existing weakness. She had previously had a hernia at the belly button, umbilicus, and those are prone to recur. The addition of trauma to the area, certainly trauma causes an increase intra-abdominal pressure which, if you have a hernia, causes things to push out and potentially become symptomatic or stuck when they were never symptomatic, stuck or problematic before.

Asked whether he could tell the difference between a trauma induced hernia and one that develops over time due to a weakness, Dr. May testified:

> Sometimes. So again, if no one had –if someone had no symptoms or if healthy muscle and healthy tissue is clearly torn with no chronic changes, you can tell that.
>
> In her circumstances, she certainly would have had chronic changes in the area and, you know acute events and acute changes in symptoms are likely related to acute events.
>
> But whether you can tell surgically at the site whether a hole in the fascia developed initially at that time is probably not possible.

Dr. May was also asked about symptoms of trauma-induced hernias. According to Dr. May, trauma induced hernias often have pain as a symptom. If the abdominal wall was torn, there would usually be pain. If a large incarceration was produced immediately, it would probably be palpable or symptomatic immediately. Dr. May performed surgery to free Mrs. Box's intestines and the intra-abdominal contents that had protruded through her abdominal wall. Accordingly to May, Mrs. Box had multiple holes in her abdominal wall.

On February 15, 2007, Mrs. Box returned to Dr. May to determine whether her hernia had reoccurred. According to Dr. May, she noted that her abdomen had become more protuberant. Dr. May recorded that "on exam she appears to have progression of laxity of her anterior abdominal wall. I can feel no clear hernia defect. She is obese and appears to have increased in her abdominal girth." Dr. May advised her regarding weight loss, aerobic activity, and reduction of recurrence risk. He also recommended an abdominal binder.

On May 15, 2008, Dr. May saw Mrs. Box again for possible recurrence of a ventral hernia. Dr. May's GI exam noted "[a]bdomen

obese, soft, minimally tender with deep palpation." May also recorded laxity at her umbilicus and left lower quadrant. He was unable to palpate a true defect. May determined that Mrs. Box either had a true hernia or weakness and thinning of the Alloderm that was used to reinforce her abdominal wall.

Dr. May recommended that Mrs. Box have this condition repaired so that she did not develop another incarceration. Dr. May's plan was to operate on Mrs. May again, this time using plastic instead of Alloderm.[1]

Mrs. Box's Convalescence

After the hernia surgery in 2005, Mrs. Box was again released to the Stallworth Rehabilitation Center, for recovery and therapy. According to Mrs. Box, she was bedridden for approximately one month after returning home. Mrs. Box did not return to work until August 16, 2005, when she resumed working part-time. She continued to work part-time until September 14, 2005, when she returned to work full-time.

Prior to her injury, Mr. Box did very little around the house and Mrs. Box did all the household work and took care of Mr. Box. Mr. Box had

[1] The surgery was apparently performed after Dr. May's deposition.

polio and suffers from dystonia, a neuromuscular condition that causes muscle contractions. He had used a cane since 2000.

After the accident, he assumed many of the duties Mrs. Box previously undertook. At the time they were living with their daughter, who was unable to help. Their grand-children also helped some. Mr. Box assisted Mrs. Box with her personal hygiene and with meal preparation and grocery shopping. He testified that her injuries impacted their marital relations for a year after the accident. Mr. Box testified that Mrs. Box can only stand for about ten or fifteen minutes at a time, before she has to sit and rest.

The parties stipulated that Mrs. Box had medical expenses of $78,828.22 related to the orthopedic injuries she suffered during the fall. Mrs. Box incurred an additional $122,189.00 in medical expenses related to the hernia surgeries and treatment for pulmonary embolism. As a result of her inability to work as a result of her injuries, Mrs. Box lost wages totaling $8,752.77.

CONCLUSIONS OF LAW

Claims Commission Jurisdiction

The Claims Commission's jurisdiction over this action is set forth in Tenn. Code Ann. § 9-8-307(a)(1)(C), which states:

> The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:
>
> * * *
>
> (C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subsection must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;

Liability

As provided for under Tenn. Code Ann. § 9-8-307(c), the State's liability "shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care." Under these concepts, a plaintiff in a negligence action must prove (1) a duty owed to the plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) injury or loss; (4) cause in fact; and (5) proximate cause.

Kilpatrick v. Bryant, 868 S.W.2d 594 (Tenn.1993); *Lewis v. State,* 73 S.W.3d 88, 92 (Tenn.Ct.App.2001).

By operation of Tenn. Code Ann. § 9-8-307, the state owes the same duty of care as a private premises owner. *See Hames v. State,* 808 S.W.2d 41 (Tenn. 1991); *Sanders v. State of Tennessee,* 783 S.W.2d 948 (Tenn.Ct.App.1989). A premises owner is under a duty to exercise reasonable care under the circumstances to prevent injury to persons lawfully on the premises. *See Eaton v. McClain,* 891 S.W.2d 587, 593-94 (Tenn. 1994). Reasonable care to make the premises safe requires an owner or possessor to not create or maintain dangerous conditions; *see Baisley v. Rain, Inc.,* 29 S.W.3d 879 (Tenn.Ct.App. 2000); and to remove or warn of a dangerous condition about which the owner knows or reasonably should know. *See Eaton v. McClain,* 891 S.W.2d 587, 594. In addition, because the scope of the duty depends upon the foreseeability of the risk, in order to prevail in a premises liability action, the plaintiff must show that the injury was a reasonably foreseeable possibility and that some action within the defendant's power more probably than not would have prevented the injury. *Dobson v. State,* 23 S.W.3d 324, 331 (Tenn.Ct.App. 2000).

Claimants argue that the unprotected gap where the fence ended between the level and sloped sides of the ramp and poor lighting constituted a dangerous condition within the meaning of Tenn. Code Ann. § 9-8-307(a)(1)(C). Claimants' expert, Mr. McLaughlin testified that the ramp did not comply with industry standards of care because the fence/handrail did not extend all the way to the level sidewalk and because the drop off was onto a sloped, unlevel surface. In addition, McLaughlin testified that the lighting condition as he filmed and tested them more than a year after the accident did not comply with industry standards.

The proof demonstrated that Mrs. Box was injured as she left the Murphy Center at MTSU, when she stepped from one side of a loading dock ramp onto a lower sloping side used by trucks with deliveries. Hours earlier, Mrs. Box had entered the building by this same entrance and she had passed by the sloping ramp and determined that she needed to go around the large yellow bollard located between the two sides of the ramp. From the direction that Mrs. Box entered, the physical condition of

the ramp was clearly visible as was the yellow bollard preventing vehicles from driving over the drop off.

After reviewing the proof, the Commission cannot conclude that the State breached its duty to Mrs. Box by reason of the lighting in place on the night of the accident. It is by no means clear that the lighting conditions described and filmed by Mr. McLaughlin were the same as those at the time of the accident. The proof was disputed as to whether there was a light on in the weight room directly across from the dock. Other factors to be considered were whether the trees were sufficiently large at the time of the accident to have blocked lighting coming from the parking lot area and the effect of the gibbous moon.

Even assuming that the lighting was the same, the fence and the yellow bollard are visible, as is the yellow "no parking" and "fire lane" markings on the pavement. The bottom edge of the fence appears to be visible and there appears to be sufficient lighting to navigate the ramp.[2] The Commission finds that the evidence does not preponderate in claimant's favor with respect to this issue.

[2] The video was originally viewed at the hearing in a room estimated by Mr. McLaughlin to be fifty candles. The Commission subsequently viewed the video again in a completely darkened room.

The Commission agrees, however, that the unprotected gap between the fence and the bollard constituted a dangerous condition and its presence violated the duty of care owed by the MTSU to Mrs. Box. Based upon the testimony that the ramp was used as a public entrance, combined with evidence showing that the gap allowed access to a drop off to an uneven surface, the Commission finds that the risk that some one would not appreciate the height differences and would fall was reasonably foreseeable. This is especially the case when the entrance is used by the occasional visitor who may not be familiar with the location and who visits after dark or under less than ideal circumstances. The Commission has also considered MTSU's proof relative to the yellow pavement markings and the yellow bollard. The pavement marking specifically warned that the area was a fire lane and that parking was prohibited. There were no markings relative to the edge of the ramp. While the bollard was clearly intended to draw attention to itself, it did not necessarily identify any particular hazard to persons exiting the building and certainly did not convey the fact of the drop off.

The very fact that a partial fence and yellow bollard had been placed at the location indicates that the defendant understood that the drop off posed a potential hazard from which vehicles and pedestrians should be protected, at least insofar as the steeper segment of the drop off was concerned. It is clear that the financial burden on MTSU imposed by finishing the fence was minimal. Although MTSU offered proof that the rationale for leaving a segment of the ramp unfenced was to permit trucks using the dock to open their doors without hitting the fence and allow trash cans to be passed between the two sides of the ramp, while certainly convenient, neither use, to which the gap was being placed, seems to be so compelling as to outweigh the risk of injury posed.

MTSU was required to exercise reasonable care to prevent injury to persons on its premises, including its sidewalks and walkways. The Commission finds that MTSU did not exercise reasonable care for Mrs. Box's safety by protecting against the tripping hazard posed by the uneven surfaces between the two sides of the ramp.

Claimants must also demonstrate that the injuries they incurred were the proximate cause and cause in fact of MTSU's negligence. "A

negligence claim requires proof of two types of causation: causation in fact and proximate cause." *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005). Both must be proven by the plaintiff by a preponderance of the evidence." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). If testimony in a lawsuit leaves a determinative fact unresolved, then the evidence does not preponderate. *See Reserve Life Ins. Co. v. Whittemore*, 442 S.W.2d 266, 275 (Tenn.Ct.App. 1969).

Cause in fact requires a determination of the cause and effect relationship between the defendant's breach of the duty of care and the plaintiff's injury. "Causation, or cause in fact, means that the injury or harm would not have occurred 'but for' the defendant's negligent conduct." *Willis v. Settle*, 162 S.W.3d 169 (Tenn.Ct.App. 2004), citing *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993).

In order to be considered a cause in fact of an injury, the defendant's conduct must be shown to have been a "necessary antecedent" to the plaintiff's injury. *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.*, 15 S.W.3d 425, 432 (Tenn.Ct.App. 1997). Tennessee's courts have consistently recognized that conduct cannot be a cause in fact of an

injury when the injury would have occurred even if the conduct had not taken place. *Id.* at 430 -431.

In addition to showing that the defendant's conduct was the cause in fact of his injury, a plaintiff must also prove that his injuries were proximately caused by the defendant's conduct. In Tennessee, there is a three-pronged test for proximate causation: (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. *McClenahan v. Cooley,* 806 S.W.2d 767, 775 (Tenn. 1991). Thus, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. *Bennett v. Putnam County,* 47 S.W.3d 438, 443 (Tenn.Ct.App. 2000).

There is little question but that causation was proved as to Mrs. Box's orthopedic injuries. Claimants, however, also allege that Mrs. Box's

hernia and the pulmonary emboli she developed during surgery for that hernia were caused by the fall on MTSU's property. This is a much closer question.

Claimants rely upon the testimony of Addison May, M.D., who performed Mrs. Box's hernia repair. Dr. May opined that Mrs. Box had a previous hernia and that the fall likely caused either a separate hernia or an incarceration due to increased abdominal pressure.

Mrs. Box's preoperative report prepared before her hernia surgery in July of 2005 indicated that she "noted one hernia in the RLQ *originally* in October, of 2004 .... Of note, she had an umbilical hernia repair many years ago (date unknown)." That same month, on October 7, 2004, she underwent a colonoscopy in which her physician, Dr. Avant, noted that Mrs. Box "has an umbilical hernia, which she believes requires repair."

Dr. May testified that most commonly known hernias are caused by personal factors, such as obesity or laxity of the abdominal wall or lack of closure of a defect that allows over time a defect to enlarge. Any repetitive stress on the abdominal wall will increase the risk of reoccurrence or primary hernia.

According to Dr. May, hernias can also be caused by trauma. If the abdominal wall was torn, however, there would usually be pain. If a large incarceration was produced immediately, it would probably be palpable or symptomatic immediately.

Dr. May found no evidence of trauma to the musculature of Mrs. Box's abdominal wall. All of her holes were in the fascia, a thick layer of connective tissue. According to May, it is common for women of Mrs. Box's age to have a wide strip where the muscle has separated and only fascia covers the organs. The medical proof contained multiple references to her obesity.

Mrs. Box reported no abdominal pain in the emergency room and although a physical exam was performed on her abdomen, no hernia or mass was palpated. Dr. May testified that a hernia such as the one that Mrs. Box had would be palpable. Contrary to Dr. May's notes reflecting that Ms. Box had a hernia that became increasingly symptomatic following the fall, Mrs. Box testified that she did not in fact notice the hernia until sometime after she was released from Stallworth and before she saw Dr. Shuler more than a month after the accident.

May did not first treat Mrs. Box until approximately six weeks after the accident. Dr. May testified that it was impossible to tell whether Mrs. Box's hernias were trauma induced or whether they developed over time due to a weakness. May did not remember and did not describe in his operative note whether he saw the area where the previous hernia repair had been done. Dr. May testified that even if some hernias were trauma induced and others were not, after a few weeks they would "all have about the same amount of inflammation and stuff around it."

Mrs. Box underwent another hernia surgery performed by Dr. May in June of 2008. Dr. May, who had not performed the surgery at the time he was deposed, testified that he planned to replace the Alloderm used in the previous surgery with a plastic. He believed that the Alloderm had thinned out. Dr. May testified that Mrs. Box either had a true hernia or a weakness caused by the thinning. Dr. May did not indicate why the Alloderm had thinned, only that it was put in knowledge of the possibility that it might.

Although May testified that Mrs. Box is at increased risk of recurrent hernias because of her multiple hernia repairs, she was at increased risk

before the accident because she had had a prior surgery and because she apparently had only fascia covering her abdomen. In addition, Dr. May's note from February 15, 2007, reflects that when he examined her at that time for possible reoccurrence of her hernia, he noted that she had a progression of the laxity of her abdominal wall and that "she appears to have increased her abdominal girth," factors that do not appear to be related to the fall.

Claimants had the burden of proving by a preponderance of the evidence that Mrs. Box's hernia was caused or aggravated by the fall. A tortfeasor is liable for all injuries proximately caused to a plaintiff. When the plaintiff has a pre-existing medical condition, "[t]he defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which the plaintiff was at the time of the [injury]." *Elrod v. Town of Franklin*, 140 Tenn. 228, 240, 204 S.W.2d 298, 301 (1917). A tortfeasor must accept the injured person as he finds him and is liable for the injury or harm actually caused by or which is the natural consequence of the tortfeasor's negligence. *Id.*

Although a plaintiff is entitled to recover for all injuries proximately caused by the acts of a tortfeasor, when a plaintiff's "injuries are aggravated or activated by a pre-existing physical or mental condition, [the] defendant is liable only to the extent that his wrongful act proximately and naturally aggravated or activated plaintiff's condition." *Haws v. Bullock*, 592 S.W.2d, 588, 591 (Tenn.Ct.App. 1979); *Kincaid v. Lyerla*, 680 S.W.2d 471 (Tenn.Ct.App. 1974). The defendant is not liable for damages from an earlier condition or injury, except to the extent that they are aggravated or exacerbated by the defendant's negligence. *Id.* Where possible, the factfinder must apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. *Id.*, 592 S.W.2d at 591.

The Commission has considered and weighed Dr. May's testimony regarding the cause of the hernia. While it is true that the trier of fact should not ignore the testimony of an expert witness, a fact finder may weigh the testimony and even reject it if it finds that it is inconsistent with the facts in the case or otherwise unreasonable. *Gibson v. Ferguson*, 562 S.W.2d 188, 189-90 (Tenn.1976). "The opinion of an expert may be reduced

to mere conjecture by proof of physical facts completely inconsistent therewith[.]" *Standard Oil Co. of Louisiana v. Roach,* 19 Tenn.App. 661, 675, 94 S.W.2d 63, 69 (1935).

Ultimately, the Commission finds that Dr. May's opinion that Mrs. Box's fall likely caused either a separate hernia or an incarceration of a preexisting hernia due to increased abdominal pressure must be rejected. Mrs. Box noted a hernia less that a year before her accident, at which time it was apparently symptomatic enough such that she felt it needed repair.

According to Dr. May, hernias can progressively develop over time due to repetitive stress or may be caused by trauma. Dr. May admitted that he would not have been able to tell the difference. Mrs. Box reported no injury or symptoms and did not notice the hernia for approximately a month after the fall. Because, these facts are inconsistent with Dr. May's conclusion, the Commission finds that claimants failed to prove causation with respect to the surgical procedures performed by Dr. May.

Damages

Mrs. Box sustained reasonable and necessary medical expenses of $78,828.22 for treatment of her lower extremity injuries. In addition, she proved lost wages of $8,752.77. After weighing the facts and

circumstances, the Commission determines that Mrs. Box sustained damages of $265,000. The Commission finds that Mr. Box's damages for loss of consortium were $20,000.

The State has raised Mrs. Box's comparative negligence as a basis for barring recovery. The State argues that Mrs. Box had a duty to exercise care for her own safety, including not venturing into areas where she could not see or watching to see the path that other people, none of whom stepped off the drop-off, were going.

In addition, Mrs. Box alleged that she noticed the yellow bollard on the way into the auditorium and had seen that she needed to go around it. Mrs. Box failed to do so on the way out, despite the fact that she had seen and appreciated the condition hours earlier.

The Commission finds that Mrs. Box failed to exercise reasonable care when she proceeded on the walkway at the point that she claims she could no longer see and by failing to go around the bollard despite her knowledge of the conditions at the locations. The Commission finds that this negligence was also a proximate cause and cause in fact of her injury.

Therefore, under the principles of comparative negligence, the Commission apportions the parties' negligence as follows:

State of Tennessee: 80%

Sallie Box : 20%

Total: 100%

Accordingly, Sallie Box shall recover $212,000. Tom Box shall recover $16,000.

It is so **ORDERED** this the 7th day of October, 2009.

STEPHANIE R. REEVERS
Claims Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 8 day of October 2009.

Marsha Richeson

Marsha Richeson, Administrative Clerk
Tennessee Claims Commission